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Denver County Court

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The Impact of the *Gerhardt* Decision on Marijuana Driving Cases

Mary A. Celeste

One of the major consequences of legalizing marijuana is that it can affect drivers on the roadways. Courts across the country are facing issues such as the applicability of the long established standard field sobriety test for alcohol-driving impairment to determine marijuana-driving impairment; the characteristics indicative of marijuana-driving impairment; and the blood nanogram concentration levels that establish marijuana-driving impairment. The Massachusetts Supreme Court was the first state Supreme Court out of the box to address these issues.

On January 6, 2017, the Massachusetts Supreme Court heard oral arguments in the case of *Commonwealth v. Gerhardt*¹, which required the court to consider several novel questions:

- What physical characteristics (e.g., bloodshot eyes, dilated pupils, lack of coordination, slow balance or reaction times, garbled or slow speech) permit an inference of impaired driving by reason of marijuana use?
- Is there a scientifically established correlation between performances on field sobriety tests and marijuana-impaired driving?

- Is there a level of intoxication that is generally accepted as establishing impairment as to driving?
- Has any jurisdiction, foreign or domestic, recognized such a level of intoxication?²

As far as marijuana-driving cases go, the facts of the *Gerhardt* case were not unusual. The defendant (*Gerhardt*) was stopped for driving without working tail lights. Once stopped, an officer saw smoke inside the vehicle and detected the odor of marijuana. The defendant stated that he had smoked around three hours before the stop, although another passenger said it had only been 20 minutes. *Gerhardt* pulled two marijuana cigarettes (“roachies”) from an ashtray and handed them to the officer. In a subsequent search, officers found two more roaches.³

As more and more marijuana-driving cases come forward, the plain view doctrine will play a large role. The plain-view doctrine has been expanded to include plain feel, plain smell, and plain hearing.⁴ The U.S. Supreme Court agrees that the smell of marijuana may provide probable cause to obtain a search warrant.⁵ Further, some state courts hold that detection of the odor of marijuana or marijuana smoke provides probable cause for a warrantless search.⁶ Oddly enough, searches based upon marijuana smell have decreased in the states of

Footnotes

1. *Commonwealth v. Gerhardt*, 477 Mass. 775, 81 N.E.3d 751 (2017); *Public Case Information*, SUPREME JUDICIAL COURT AND APPEALS COURT OF MASSACHUSETTS, http://www.ma-appellate-courts.org/display_docket.php?dno=SJC-11967 (last updated Oct. 18, 2017).
2. *Gerhardt*, 477 Mass. at 774–88; Martha Bebinger, *Mass. High Court Tackles Driving Under the Influence of Marijuana*, ALL THINGS CONSIDERED (Jan. 6, 2017), <http://www.wbur.org/all-things-considered/2017/01/06/supreme-judicial-court-marijuana-driving>.
3. *Gerhardt*, 477 Mass. at 778–79.
4. See, e.g., *United States v. Fisch*, 474 F.2d 1071 (9th Cir. 1973) (recognizing a “plain hear” exception, the Court held there was no search where officers overheard conversation in adjoining hotel room); *United States v. Pierre*, 958 F.2d 1304 (5th Cir.1992) (holding that an officer smelling marijuana in defendant’s car was not an unreasonable search under the Fourth Amendment).
5. See *Florida v. Jardines*, 569 U.S. 1, 3, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013).
6. See, e.g., *State v. Sarto*, 195 N.J. Super. 565, 574, 481 A.2d 281 (App. Div. 1984) (reversing the order of suppression because “the strong odor of unburned marijuana gave police probable cause to search the trunk for evidence of contraband”); *Waugh v. State*, 20 Md. App. 682, 691, 318 A.2d 204 (Md. Ct. Spec. App. 1974) (stating that “[t]rained investigators are entitled to rely upon the sense of smell to establish probable cause, just as surely as they are entitled to rely upon the senses of sight, hearing, touch or taste”), *rev’d on other grounds*, 275 Md. 22, 338 A.2d 268 (1975); see also Andrea Ben-Yosef, Annotation, *Validity of Warrantless Search of*

Motor Vehicle Based on Odor of Marijuana—State Cases, 114 A.L.R. 5th 173 (2003); 68 AM. JUR. 2d *Searches and Seizures* § 72 (1993); *Odor of Narcotics as Providing Probable Cause for Warrantless Search*, 5 A.L.R. 4th 681 (1981). In Virginia, the Court of Appeals has hinted at an acceptance of plain smell, but has never clearly adopted the doctrine. See *Commonwealth v. Jones*, No. 0857-97-3, 1997 WL 557005, at *1 (Va. Ct. App. Sept. 9, 1997) (appearing to find probable cause based on odor alone, but not clearly excluding other factors from the holding); *Lewis v. Commonwealth*, No. 1483-96-1, 1997 WL 260581, at *1–2 (Va. Ct. App. May 20, 1997) (suggesting, but not expressly stating, that the odor of marijuana alone gave officer probable cause to search vehicle). The situation in Georgia is substantially similar to that in Virginia. Compare *Brewer v. State*, 199 S.E.2d 109, 112 (Ga. Ct. App. 1973) (stating that odor of marijuana is not in itself sufficient evidence to establish probable cause), *overruled by State v. Folk*, 521 S.E.2d 194, 198 (Ga. Ct. App. 1999), and *Albert v. State*, 511 S.E.2d 244, 248 (Ga. Ct. App. 1999) (recognizing that the issue of plain smell was still unresolved in Georgia, and holding that odor of marijuana was only one factor in the determination of probable cause), *with Rogers v. State*, 205 S.E.2d 901, 903 (Ga. Ct. App. 1974) (recanting prior statement from *Brewer* that odor alone cannot establish probable cause), and *Folk*, 521 S.E.2d at 198 (“We now hold that a trained police officer’s perception of the odor of burning marijuana . . . constitutes sufficient probable cause to support the warrantless search of a vehicle.”). Although *Folk* appeared to settle the issue of plain smell in Georgia, it remains to be seen whether the Georgia Supreme Court will ratify that decision if given the opportunity to rule on plain smell.

Colorado and Washington, which were two of the first states to legalize recreational marijuana.⁷

All of the facts related to the Gerhardt stop established probable cause to request that he perform a standard field sobriety test and Gerhardt consented. He failed several tests:

Rather than standing heel to toe, with his right foot in front and his left toes touching his heel, as he had been shown, Gerhardt moved his feet so that they were side by side; he also did not turn around as instructed . . . Gerhardt[t] did not remain upright on one foot, instead putting his foot down multiple times, and swayed.⁸

It should be noted that counting backwards and reciting the alphabet, although frequently used by law enforcement in suspected driving-impairment stops, is not part of National Highway Traffic Safety Administration sanctioned alcohol field sobriety tests.

For purposes of alcohol impairment, a standard field sobriety test consists of the horizontal gaze nystagmus, the one-leg stand, and the walk-and-turn.⁹ For purposes of detecting drug impairment, sometimes the Romberg or modified Romberg test is added:

[T]he officer will ask you to stand with your feet together, head tilted slightly back and eyes closed. You will be asked to estimate when 30 seconds has passed, and say “stop” when you think it’s been that long. While you are balancing, the officer will look for six clues: amount

and direction of swaying, eyelid/body tremors, estimate of when 30 seconds has passed, muscle tone, sounds or statements made during the test, ability to follow directions.¹⁰

Some research says that standard field sobriety tests are effective in identifying marijuana-driving impairment¹¹, some research says that they are only moderately successful¹², while other research says that only the walk-and-turn or the one-leg stand tests are effective.¹³ One study stated that the finger-to-nose test was the best test to accurately predict cannabis impairment.¹⁴ Many agree, however, that the horizontal gaze nystagmus test is not effective.¹⁵

Indicators of marijuana-driving impairment include eyelid tremors, increased pulse, elevated systolic blood pressure, dilated pupil size, lane weaving, driving on the wrong side of the road, drifting, following too close, driving a large distance from the vehicle ahead, not responding to questions, reddened eyes, slow pupil reaction, nervousness, laughing, and unusual facial expressions.¹⁶ Some believe that one side effect includes “green tongue,” although the appellate courts in both Utah and Washington are skeptical.¹⁷

Studies and reports from 2004 through 2012 designated THC blood concentration levels from 2 to as high as 30 THC ng/ml as establishing marijuana-driving impairment.¹⁸ The

Some research says that standard field sobriety tests are effective in identifying marijuana-driving impairment . . .

7. Sam Petulla & Jon Schuppe, *Police Searches Drop Dramatically in States that Legalized Marijuana*, NBC NEWS (June 23, 2017), <http://www.nbcnews.com/news/us-news/police-searches-drop-dramatically-states-legalized-marijuana-n776146>.

8. Gerhardt, 477 Mass. at 779.

9. *A Resource Guide Describes the Science and the Law About Horizontal Gaze Nystagmus*, NHTSA (Sept. 1999), <https://one.nhtsa.gov/About-NHTSA/Traffic-Techs/current/ci.A-Resource-Guide-Describes-The-Science-And-The-Law-About-Horizontal-Gaze-Nystagmus.print>; DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION (March 2013), http://www.njsp.org/division/investigations/pdf/adtu/20160105_participantmanual.pdf.

10. *Romberg Balance Test*, FIELDSOBRIETYTESTS.ORG, <http://www.fieldsobrietytests.org/rombergbalancetest.html> (last visited Dec. 13, 2017).

11. Hartman et al., *Drug Recognition Expert (DRE) Examination Characteristics of Cannabis Impairment*, 92 ACCIDENT ANALYSIS & PREVENTION 219–29 (July 2016), <https://shawglobalnews.files.wordpress.com/2017/03/2016-hartman-dre-examination-characteristics-of-cannabis-impairment.pdf>

12. Bosker et al., *A Placebo-Controlled Study to Assess Standardized Field Sobriety Tests Performance during Alcohol and Cannabis Intoxication in Heavy Cannabis Users and Accuracy of Point of Collection Testing Devices for Detecting THC in Oral Fluid*, 223 PSYCHOPHARMACOLOGY 439–46 (2012).

13. K. Papafotiou et al., *An Evaluation of the Sensitivity of the Standardised Field Sobriety Tests (SFSTs) to Detect Impairment due to Marijuana Intoxication*, 180 PSYCHOPHARMACOLOGY 107–14 (2005); Luke A. Downey et al., *Detecting Impairment Associated with*

Cannabis with and without Alcohol on the Standardized Field Sobriety Tests, 224 PSYCHOPHARMACOLOGY 581–89 (2012); AJ Porath-Waller & DJ Beirness, *An Examination of the Validity of the Standardized Field Sobriety Test in Detecting Drug Impairment Using Data from the Drug Evaluation and Classification Program*, 15 TRAFFIC INJURY PREVENTION 125–31 (2014).

14. Hartman et al., *supra* note 11, at 223.

15. *Id.* at 226; see also *Drug Categories*, LOS ANGELES POLICE DEPARTMENT, http://www.lapdonline.org/special_operations_support_division/content_basic_view/1039 (last visited Dec. 18, 2017).

16. Karl Citek, *The Drug Evaluation Classification Program: Using Ocular and Other Signs to Detect Drug Intoxication*, 69 J. AMER. OPTOMETRIC ASS'N 211, 213 (1998).

17. *State v. Hechtle*, 89 P.3d 185, 190 (Utah Ct. App. 2004); *State v. Wheeler*, No. 24397–1–II, 2000 WL 646511, *2 (Wash. Ct. App. May 19, 2000).

18. Drummer et al., *The Involvement of Drugs in Drivers of Motor Vehicles Killed in Australian Road Traffic Crashes*, 36 ACCIDENT ANALYSIS & PREVENTION 239–48 (2004); J.G. Ramaekers et al., *Cognition and Motor Control as a Function of THC Concentration in Serum and Oral Fluid: Limits of Impairment*, 85 DRUG & ALCOHOL DEPENDENCE 114–22 (2006); Franjo Grotenherman et al., *Developing Limits for Driving Under Cannabis*, 102 ADDICTION 1910–17 (2007); Sewell et al., *The Effect of Cannabis Compared to Alcohol on Driving*, 18 AM. J. ADDICTIONS 185–93 (2009); W. M. Bosker et al., *A Placebo-Controlled Study to Assess Standardized Field Sobriety Tests Performance During Alcohol and Cannabis Intoxication in Heavy Cannabis Users and Accuracy of Point of Collection Testing Devices for Detecting THC in Oral Fluid*, 223 PSYCHOPHARMACOLOGY 439, 445 (2012).

[T]he Gerhardt court stated that “[t]he absence of scientific consensus regarding the use of standard [field sobriety tests] in attempting to evaluate marijuana intoxication does not mean that they have no probative value.”

more recent studies and reports, however, do not support the designation of a blood nanogram concentration level as the sole indicator of marijuana-driving impairment. The July 2017 National Highway Traffic Safety Administration Marijuana-Impaired Driving Report to Congress stated that there is a “poor correlation of THC concentrations in the blood with impairment” and that “setting per se levels is not meaningful.”¹⁹ In 2016 the AAA Traffic Safety Administration also stated that “it is difficult to establish a relationship between a person’s THC blood or plasma concentration and performance impairing effects. Concentrations of parent

drug and metabolite are very dependent on pattern of use as well as dose. . . . It is inadvisable to try and predict effects based on blood THC concentration alone.”²⁰ Also in 2016, the AAA Traffic Safety Research Foundation conducted a study and concluded that “quantitative threshold for *per se* laws for THC following cannabis use cannot be scientifically supported.”²¹

There are pending federal studies related to marijuana and driving. The National Institute on Drug Abuse is using a \$1.4 million grant to conduct a five-year study to determine how marijuana impacts critical brain functions for driving.²² The National Highway Traffic Safety Administration is conducting a second research project to take initial steps towards developing a battery of tests to identify drivers who have recently used marijuana.²³ The State of Colorado granted the University of Colorado \$1.68 million to look at the impacts of marijuana use on driving.²⁴

In the midst of all of this attention on marijuana and driving, the long-awaited *Gerhardt* decision was handed down in September 2017. The applicability of standard field sobriety tests to marijuana-driving impairment presented a few important legal issues for the Massachusetts Supreme Court. One

issue was that standard field sobriety tests were established to detect alcohol driving impairment—not marijuana or drug-driving impairment. Additionally, as the court noted, there are conflicting studies on the topic and no consensus in the scientific community to support their applicability to marijuana-driving impairment.

Regardless, the *Gerhardt* court stated that “[t]he absence of scientific consensus regarding the use of standard [field sobriety tests] in attempting to evaluate marijuana intoxication does not mean that they have no probative value.”²⁵ As such, the court concluded that, although a police officer may testify about their observations related to standard field sobriety tests:

A police officer may not suggest, however, on direct examination that an individual’s performance on a [standard field sobriety test] established that the individual was under the influence of marijuana. Likewise, an officer may not testify that a defendant “passed” or “failed” any [standard field sobriety test], as this language improperly implies that the [standard field sobriety test] is a definitive test of marijuana use or impairment.²⁶

The court went even further and concluded that:

The fact that the [standard field sobriety tests] cannot be treated as scientific “tests” of impairment means that evidence of performance on [standard field sobriety tests], *alone*, is not sufficient to support a finding that a defendant’s ability to drive safely was impaired due to the consumption of marijuana, and the jury must be so instructed.²⁷

What other factors should be considered in determining driving impairment? Perhaps toxicology reports indicating THC blood nanogram concentration levels; the degree of bad driving; physical evidence, such as marijuana paraphernalia or cigarettes in plain view; inculpatory statements, such as “I just smoked some marijuana”; an odor of marijuana; observations by law enforcement of characteristics like bloodshot eyes; and others as identified by the *Gerhardt* Court. Toxicology reports offering THC blood concentration levels are themselves under scrutiny. As noted above in the National Highway Traffic Safety Administration’s report to Congress, setting *per se* levels is not

19. R. COMPTON, MARIJUANA-IMPAIRED DRIVING—A REPORT TO CONGRESS, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, DOT HS 812 440, iii (July 2017).

20. DRUGS AND HUMAN PERFORMANCE FACT SHEETS, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, DOT HS 809 725, 8–9 (April 2004); *see also* AMY BERNING & DERECE D. SMITHERS, UNDERSTANDING THE LIMITATIONS OF DRUG TEST INFORMATION, REPORTING, AND TESTING PRACTICES IN FATAL CRASHES, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, DOT HS 812 072 (November 2014).

21. BARRY LOGAN ET AL., AAA FOUNDATION FOR TRAFFIC SAFETY, AN EVALUATION OF DATA FROM DRIVERS ARRESTED FOR DRIVING UNDER THE INFLUENCE IN RELATION TO *PER SE* LIMITS FOR CANNABIS 3 (2016).

22. Gregory B. Hladky, *Hartford Hospital Researches Studying Pot Smoking and Driving*, HARTFORD COURANT (April 30, 2017),

<http://www.courant.com/health/hc-marijuana-studies-hartford-hospital-20170403-story.html>.

23. ADVANCED ROADSIDE IMPAIRED DRIVING ENFORCEMENT, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION 8 (2007), <https://oag.dc.gov/sites/default/files/dc/sites/oag/publication/attachments/2007%20NHTSA%20ARIDE%20Manual.pdf>.

24. John Ingold, *Colorado Researchers Receive \$2.35M to Study Marijuana Use in Driving, Other Impacts of Legalization*, DENVER POST (December 13, 2016), <http://www.denverpost.com/2016/12/13/colorado-researchers-grant-marijuana-driving-legalization-impacts/>.

25. *Gerhardt*, 477 Mass. at 782.

26. *Id.* at 784.

27. *Id.* at 785 (emphasis added).

meaningful,²⁸ and last year's AAA Traffic Safety Research Foundation study concluded that "quantitative threshold for *per se* laws for THC following cannabis use cannot be scientifically supported."²⁹ If the toxicological findings also become an issue, then Massachusetts may only be left with the drug recognition expert observations as identified and supported by the ruling: bad driving, physical evidence, odor, and inculpatory statements.

This may cause the "road" to conviction in marijuana-driving cases to narrow in Massachusetts and perhaps in other *Daubert* states. Massachusetts, federal courts, and over half of the state courts in the U.S. use the *Daubert* standard for the admissibility of scientific evidence.³⁰ Does this mean that other courts will adopt the Massachusetts analysis on the admissibility of standard field sobriety tests in marijuana-driving cases even though the Massachusetts decision is not binding on them? Is the Massachusetts Supreme Court ruling in *Gerhardt* setting the stage for how courts should treat standard field sobriety tests for marijuana-driving-impairment cases and maybe even all drugged-driving cases?

What about other drugs and driving impairment? A recent report authored by the Foundation for Advancing Alcohol Responsibility and the Governors Highway Safety Association found that 43% of drivers who died in a crash had used a legal or illegal drug compared to 37% who tested above the illegal *per se* limit for alcohol.³¹ While this information may be indicative of an increase in drugged-driving fatalities as surpassing alcohol-driver fatalities, the report states that "[d]ata on drug presence in crash-involved drivers are incomplete in most jurisdictions, inconsistent from state to state, and some-

times inconsistent across jurisdictions within states."³² Although the Foundation for Advancing Alcohol Responsibility has the best nationwide data on this matter, there are some shortcomings in the data because it only tested 57% of drivers involved in crashes.³³ It is also important to note that driving under the influence of drugs or drugs found at the time of an autopsy is not necessarily equivalent to impaired driving.

All things considered, driving under the influence of marijuana in particular, and driving under the influence of drugs in general, is an escalating problem for the roadways and the courts. State trial and supreme courts will have to make important decisions about how to address the science establishing impairment, the role of the drug recognition expert, and the applicability of standard field sobriety tests in drugged-driving cases. Will the Massachusetts findings regarding marijuana and driving under a *Daubert* analysis influence how courts will treat driving under the influence of other drugs as well? Slowly the answers will come.



Judge Mary A. Celeste (retired) served as a judge of the Denver County Court from 2000 to 2015 and was the presiding judge from 2008 to 2010. She was president of the American Judges Association in 2010–2011. Celeste is the immediate past chair of the ABA National Conference for Specialized Court Judges and a former liaison for judicial outreach for NHTSA.

28. COMPTON, *supra* note 19, at iii.

29. BARRY LOGAN ET AL., *supra* note 21, at 3.

30. Commonwealth v. Lanigan, 419 Mass. 15, 24, 641 N.E.2d 1342, 1348 (1994); 50 State Survey of Daubert/Frye Applicability, ABA, <https://apps.americanbar.org/litigation/committees/trialevidence/daubert-frye-survey.html> (last visited Dec. 19, 2017); *Daubert Standard*, LEGAL INFO. INST., [https://www.law.cornell.edu/](https://www.law.cornell.edu/wex/daubert_standard)

[wex/daubert_standard](https://www.law.cornell.edu/wex/daubert_standard) (last visited Dec. 19, 2017).

31. JAMES HEDLUND, DRUG-IMPAIRED DRIVING, GOVERNORS HIGHWAY SAFETY ASSOCIATION & FOUNDATION FOR ADVANCING ALCOHOL RESPONSIBILITY 7, 9 (2017).

32. *Id.* at 4.

33. *Id.* at 7.

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Answers to Crossword

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